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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MAURICE LEWIS, Defendant and Appellant.	F058281 (Super. Ct. No. MCR023172) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Madera County. John W. DeGroot, Jennifer R.S. Detjen, and Mitchell C. Rigby, Judges.[†]

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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[*] Before Dawson, Acting P.J., Kane, J., and Poochigian, J.

[†] Judge DeGroot presided over appellant's change of plea hearing and initially placed him on probation. Judge Detjen sentenced appellant to prison, stayed execution of sentence, and placed appellant back on probation. Judge Rigby presided over appellant's probation revocation hearing and committed him to prison.

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STATEMENT OF THE CASE

On November 1, 2005, appellant, Maurice Lewis, was charged in a criminal complaint with possessing methamphetamine on October 28, 2005 (Health & Saf. Code, § 11377, subd. (a), count one) and resisting arrest (Pen. Code, § 148, subd. (a), count two).[1] The complaint further alleged a prior prison term enhancement (§ 667.5, subd. (b)) for an assault conviction in 1997 and a prior serious felony conviction within the meaning of the three strikes law (§ 667, subds. (b)-(i)) for an attempted robbery conviction in 1997. Appellant initially entered into a plea agreement on November 14, 2005, but withdrew his guilty plea on January 10, 2006.

On January 23, 2006, appellant executed an advisement of rights, waiver, and plea form for felonies in which he acknowledged and waived his constitutional rights pursuant to *Boykin*/*Tahl*.[2] Appellant acknowledged the consequences of his plea. Appellant would plead no contest to one count of possession of a controlled substance (Health & Saf. Code, § 11350), the prior serious felony conviction, and the prior prison term enhancement.

On January 23, 2006, the prosecutor explained appellant would admit count one as amended to reflect a violation of Health and Safety Code section 11350. Appellant would further admit the strike allegation and the prior prison term enhancement and would receive Proposition 36 probation. The court explained to appellant that the upper term sentence he faced would be three years which would be doubled to six years plus one year for the prior prison term enhancement for a total prison term of seven years.

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[1] Unless otherwise indicated, all statutory references are to the Penal Code. Count 2 was originally alleged as a robbery but was amended to grand theft.

[2] *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

The court advised appellant of the consequences of his plea and his constitutional rights. Appellant said he initialed, signed, read, and understood the contents of the plea form. Appellant indicated he had no questions about his rights, the possible sentence the court could impose, or about the drug treatment program. The parties stipulated to a factual basis for the plea, including the strike allegation and the prior prison term enhancement. Appellant pled no contest to a violation of Health and Safety Code section 11350. Appellant admitted the prior serious felony conviction and the prior prison term enhancement.[3]

At the sentencing hearing on February 22, 2006, the court indicated appellant's total prison liability was seven years. When the court asked whether there was any legal cause why sentence should not be pronounced, defense counsel replied, "No." Defense counsel requested "that the misdemeanor matter be turned to time served so that way Mr. Lewis could then participate in the Prop. 36 program." The court suspended imposition of sentence, placed appellant on probation for three years, ordered appellant serve 38 days in county jail, and gave appellant credit for 38 days he had already served.

On July 17, 2006, September 18, 2006, and May 7, 2007, appellant waived his right to a contested hearing and admitted drug-related probation violations for using illegal narcotics and for missing counseling sessions. On May 7, 2007, when the court noted that another violation could land appellant in state prison and asked if he wanted to remain on Proposition 36 probation, appellant replied that he did. The court continued appellant on probation at the conclusion of each hearing.

On December 14, 2007, appellant waived his right to a hearing and admitted a fourth violation of probation for failure to appear for a scheduled appointment, failure to

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[3] In an unrelated action, appellant admitted misdemeanor allegations of malicious mischief and misdemeanor battery.

update his residence and employment status, and failure to appear for counseling in September and October 2007. The court revoked appellant's probation and referred his case to the probation department.

On January 14, 2008, the court noted it had read the probation officer's report and recommendation.[4] The court sentenced appellant to prison to the upper term of three years and doubled to six years pursuant to the three strikes law. The court imposed a consecutive term of one year for the prior prison term enhancement for a total prison term of seven years. The court stayed execution of the sentence and reinstated probation for five years from February 22, 2006, under all previous terms and conditions. The court told appellant to report to the Felony Drug Court probation officer. The court advised appellant that he was to enroll in and complete the Delancey Street Inpatient Substance Abuse Program. Neither appellant nor his counsel lodged any objection to the court's orders.

On April 10, 2009, the probation department filed a petition alleging appellant violated probation by failing to meet program requirements and by consuming illegal drugs. On June 5, 2009, the court began a contested probation revocation hearing. Appellant testified that since being placed in felony drug court in July 2008, he did not have a positive drug test. His last positive drug test was in December 2007. Appellant explained he had been clean for 16 months.

Appellant stated that recently he attended his counseling sessions. Appellant admitted to a relapse. Due to stress that was, in part, work related, and due to a long-term drug addiction since he was 15 years old, appellant relapsed. Appellant told his probation officer about the relapse. Appellant admitted he was kicked out of a Salvation Army

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[4] The probation officer recommended appellant's probation be revoked and that he be sentenced to prison for seven years.

Drug program in July 2009, but he was reinstated on probation. Appellant denied he was kicked out of the program for failing to take a drug test because he had already been told to leave the program. Appellant admitted he was released from the program for using Tylenol with codeine.

Appellant went to the Maroa Home, but he said he was terminated from that program because a counselor had a vendetta against him. Appellant denied doing anything wrong. Although appellant went back to the Maroa Home, he was kicked out again.

Appellant's probation officer, Flora Munoz, testified appellant was making progress until April 2009. Although appellant was given opportunities in the Proposition 36 program, he failed to comply with the program. Munoz had an appointment with appellant on April 8, 2009, but he arrived two hours late. Munoz had to call appellant to get him to the appointment. Appellant indicated to Munoz that he knew he had an appointment that day with her.

When appellant arrived for the appointment, he told Munoz he was going to be honest with her that he was going to have a dirty test. Appellant had been in and failed three programs. The court found appellant violated the terms of his probation by testing positive for ingestion of codeine, failure to complete drug programs, and admitting to his probation officer that he would test dirty for use of illegal drugs.

On July 10, 2009, the court lifted the stay of execution on appellant's seven-year prison sentence. On July 10, 2009, the court committed appellant to prison for seven years. Appellant filed a timely notice of appeal and obtained a certificate of probable cause.

APPELLATE COURT REVIEW

Appellant's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the

record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel indicating that appellant was advised he could file his own brief with this court.

By letter on February 9, 2010, we invited appellant to submit additional briefing. Appellant replied with a lengthy letter filed on February 23, 2010, complaining that the trial court imposed an "illegal" sentence when it placed him on Proposition 36 probation. The letter argues appellant had a prior serious felony conviction under section 1192.7 which would disqualify him from Proposition 36 probation. Appellant characterizes his entire plea bargain as illegal.

On March 15, 2010, appellant filed a second letter asking why he had to suffer an illegal sentence in prison. Appellant attached a letter from his appellate counsel, Randall Conner. Conner pointed out that the potential problem with him being placed on Proposition 36 probation was not because he had a prior serious felony conviction, but because he had apparently served time in prison after his 1997 conviction and the five-year washout period of section 1210.1, subdivision (b)(1) had not yet occurred and the trial court did not detect this problem.[5] Conner explained that appellant was barred by the doctrine of estoppel from accepting a benefit and later arguing the benefit should not have been offered. Conner noted appellant could have received a sentence as high as 11 years in prison, itself a benefit of the plea agreement, and was given multiple opportunities to avoid prison entirely. As we explain, appellate counsel has accurately set forth why appellant cannot now attack his sentence on appeal.

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[5] According to the probation report, appellant was incarcerated in 2002 for violation of his parole. He reoffended in November 2005, less than five years after his last stay in state prison. The five-year washout period is measured from the time the defendant was released from state prison and when he or she commits a new offense. (*People v. Superior Court* (*Martinez*) (2002) 104 Cal.App.4th 692, 697-702.)

In *People v. Ramirez* (2008) 159 Cal.App.4th 1412 (*Ramirez*), the defendant pled guilty to selling cocaine base. The trial court sentenced him to prison for four years, suspended execution of sentence, and placed the defendant on probation. One year later, the defendant violated probation and agreed to amend his plea agreement so that he faced a five-year prison term but would remain on probation. The trial court again suspended the sentence. The defendant later violated probation and the stay of execution of his five-year sentence was lifted. The defendant challenged the trial court's authority to modify his original four-year sentence. (*Id.* at p. 1417.)

The *Ramirez* court initially noted that generally an order imposing, then suspending execution of, sentence and granting probation is an appealable order. "In general, an appealable order that is not appealed becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment." (*Ramirez, supra,* 159 Cal.App.4th at p. 1421; see also *People v. Feyrer* (2010) 48 Cal.4th 426, 433-434, fn. 5.)

Ramirez found the trial court lacked authority to modify the defendant's prison term of four years. (*Ramirez, supra,* 159 Cal.App.4th at pp. 1424-1425.) *Ramirez* noted, however, that although the court exceeded its jurisdiction by increasing the defendant's sentence, the court did not lack fundamental jurisdiction over the defendant and the subject matter of the action. (*Ramirez, supra,* 159 Cal.App.4th at pp. 1425-1427.) *Ramirez* held that because the trial court merely exceeded its jurisdiction but did not lack fundamental jurisdiction, the defendant forfeited his challenge to the order increasing his prison term because he failed to file a timely appeal from that order. (*Id.* at p. 1427.) Furthermore, the defendant's entry into the modified plea bargain created an additional basis for application of estoppel. (*Id.* at p. 1428.)

We find the holding of *Ramirez* applicable to this case which has an analogous procedural profile with the exception that the trial court here did not increase appellant's

prison term. Appellant failed to appeal from either the February 22, 2006 order placing him on Proposition 36 probation or from the January 14, 2008 orders imposing a seven-year prison term, staying execution of his sentence, and placing him back on Proposition 36 probation. Even if we assume that these orders exceeded the trial court's jurisdiction under section 1210.1, the trial court maintained both personal and subject matter jurisdiction over appellant's case. The trial court's fundamental jurisdiction in this case is indisputable.

Indeed, had the court placed appellant on basic probation with similar conditions of probation to those imposed here rather than placing him on formal Proposition 36 probation, appellant would have no basis to challenge the court's jurisdiction or its orders. As in *Ramirez*, appellant received the benefit of Proposition 36 probation without objection at any stage of the proceedings until this appeal.[6] We therefore apply the doctrine of estoppel to appellant's contention on appeal. Furthermore, appellant failed to file a timely appeal from the orders he now challenges and cannot do so now.

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues.[7]

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[6] A defendant has the right to reject the terms of probation that was granted with his or her request and to demand judgment be entered and sentence imposed. Failing to do so constitutes a waiver of objections to the conditions of probation. (*People v. Walker* (1949) 93 Cal.App.2d 54, 59.) Appellant's failure to choose this option is an additional basis for finding forfeiture of this point on appeal.

[7] The Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender, and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody.

This court, in its "Order Regarding Penal Code section 4019 Amendment Supplemental Briefing" of February 11, 2010, ordered that in pending appeals in which the appellant is arguably entitled to additional conduct credit under the amendment, we would deem raised, without additional briefing, the contention that prospective-only

DISPOSITION

The judgment is affirmed.

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application of the amendment violates the intent of the Legislature and equal protection principles. We deem these contentions raised here.

We explained in the recent case of *People v. Rodriguez* (2010) 183 Cal.App.4th 1 (petn. for review pending, petn. filed Apr. 13, 2010, S181808), however, that the amendment is not presumed to operate retroactively and does not violate equal protection under law. Appellant is, therefore, not entitled to additional conduct credit under the amendment to section 4019. Furthermore, appellant had a prior conviction of attempted robbery, a serious felony as defined by section 1192.7, subdivision (c)(19) & (39). He would not be entitled to such credits even if they could be applied retroactively.